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Nos. 02-1509 & 02-1510

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that funds in bank accounts in New York, which a foreign judgment debtor holds and possesses in its own name, which are under its exclusive control, and which it has an undisputed statutory right to retain, are, as a factual matter, "property in the United States" for purposes of the Foreign Sovereign Immunities Act and are therefore attachable under New York law.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Karaha Bodas Company, L.L.C., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Respondent Karaha Bodas Company, L.L.C. ("KBC") respectfully submits this brief in opposition to the Petitions for a Writ of Certiorari (the "Petitions") filed on April 14, 2003 by Petitioner Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and by Petitioner Ministry of Finance of the Republic of Indonesia (the "Ministry"). For the reasons that follow, KBC believes that the Second Circuit's decision was decided correctly, and that the Petitions should be denied.

STATUTES AND RULE INVOLVED

In addition to the statutes identified by Petitioners, the following statutes are pertinent to the correct resolution of this case: Fed. R. Civ. P. 69; N.Y. C.P.L.R. § 5201; N.Y. C.P.L.R. § 5222. The relevant provisions of each of these statutes are reproduced at Resp. App. A, at 1a, 3a and 6a.

COUNTER-STATEMENT

This is a straightforward commercial case involving a recalcitrant judgment debtor, Pertamina, which refuses to pay the Swiss arbitration award rendered against it, refuses to pay lawful judgments enforcing that award in the United States, Hong Kong, and Singapore, and refuses to post any appellate bonds.

As a result of Pertamina's breach of its geothermal energy contracts with KBC, KBC initiated arbitration in Switzerland in accordance with the underlying contracts. On December 18, 2000 the arbitration tribunal found that Pertamina had breached the contracts, and it awarded KBC $261.1 million.

Pet. App., at 5a.[1] On February 1, 2001, Pertamina filed an appeal with the Supreme Court of Switzerland, asserting that Swiss law governed the arbitration. The Swiss Court rejected the appeal because Pertamina failed to pay its filing fees in a timely manner. *See* Resp. App. J, at 155a.

In early 2001, KBC began proceedings to enforce the arbitration award in the United States District Court for the Southern District of Texas (the "Houston Court"). On December 4, 2001, the Houston Court confirmed the arbitration award and entered a final judgment in the amount of $261.1 million, with interest. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936 (S.D. Tex. 2001) ("Houston Judgment"), Resp. App. B, at 12a. Pertamina appealed the Houston Court's decision to the United States Court of Appeals for the Fifth Circuit, but it refused to post a supersedeas bond to stay enforcement of the judgment.

After entry of the Houston Judgment and Pertamina's refusal to file a supersedeas bond, KBC began proceedings in the United States District Court for the Southern District of New York (the "District Court") to execute upon the Houston Judgment. Pet. App., at 38a, ¶¶ 2-3. On February 22, 2002, KBC registered the Houston Judgment in the District Court. On the same date, the District Court, pursuant to Rule 69(a) and Section 5222 of the New York Civil Practice Law and Rules,[2] issued notices upon Bank of America and

1. As used herein, all citations to "Pet. App." refer to the Petition for Writ of Certiorari filed by the Ministry.

2. Rule 69(a) provides that "[t]he procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with (Cont'd)

several other banks in New York restraining the transfer or disposition of funds contained in several trust accounts held in Pertamina's name. *Id.*, at 39a, ¶ 3. As described by the Court of Appeals in the judgment below, all proceeds of the sale of liquefied natural gas through production sharing contracts are channeled through trust accounts at banks in New York. *Id.*, at 8a-9a. Both Pertamina and the Ministry then moved to quash the restraints by claiming that all of the restrained funds belong not to Pertamina, but instead to the Ministry and/or the Republic of Indonesia. *Id.*, at ¶ 4.

On April 26, 2002, the District Court ruled that a portion of the restrained funds – known as the "Retention Fee" – is Pertamina's property and is therefore subject to attachment under New York law (as applied by Rule 69(a)). Pet. App., at 38a-47a. As to the remaining funds, the District Court ruled that they belong to the Indonesian Government and thus are not subject to execution. *Id.*, at 42a, ¶¶ 12-15.

At about the same time that KBC began execution in New York, Pertamina changed its argument about the law governing the arbitration. Before the Indonesian proceeding, Pertamina had argued that because Switzerland was the legal situs of the arbitration, its law governed. Now, abandoning its prior assertions, it argued that Indonesian law, not Swiss law, governed the arbitration, and that Indonesian courts thus had authority to annul the award. *See* Resp. App. J, at 155a.

(Cont'd)
the practice and procedure of the state in which the district court is held[.]" Fed. R. Civ. P. 69(a). By effect of this rule, execution procedures with respect to cases pending in New York federal courts are governed by Article 52 of the New York Civil Practice Law and Rules, and the service and effect of restraining notices are governed by Section 5222 thereof. *See* N.Y. C.P.L.R. § 5222 (2000).

On March 14, 2002 Pertamina filed suit in Indonesia, asking the court there to annul the arbitration award and to enjoin KBC from enforcing the arbitration award anywhere in the world, including Houston and New York. Pet. App., at 5a & n.5.

In response to Pertamina's attempt to oust the U.S. courts of their jurisdiction, the Houston Court on March 29, 2002 issued a temporary restraining order enjoining Pertamina from seeking the Indonesian injunction. Resp. App. C, at 57a. Pertamina "knowingly" refused to comply with the order, and on April 9, 2002, the Houston Court held Pertamina in contempt as a result of its noncompliance with the order. *Id.*, at 59a. Immediately thereafter, the Houston Court found that under the Convention on Recognition and Enforcement of Foreign Arbitral Awards, the Indonesian Court had no jurisdiction to annul the award. Accordingly, on April 26, 2003, the Houston Court entered a preliminary injunction against Pertamina, ordering it to stop prosecuting the Indonesia action. Resp. App. D, at 62a. Pertamina appealed the preliminary injunction, but on May 17, 2002, the Fifth Circuit summarily refused any emergency relief. Resp. App. E, at 88a. Despite the Houston Court's preliminary injunction, the Fifth Circuit's denial of emergency relief, and subsequent Houston Court orders on June 28, 2002 and July 19, 2002 directing Pertamina to discontinue its prosecution of the Indonesian proceeding, *see* Resp. App. F & G, at 89a-91a, Pertamina continued the action. On August 27, 2002 the Indonesian Court purportedly annulled the arbitration award. As a result of Pertamina's defiance of the injunction, on April 24, 2002, KBC filed a second motion for contempt with the Houston Court. *See* Resp. App. G, at 93a. This second contempt motion has been deferred pending the Fifth Circuit's resolution of Pertamina's appeal of the Houston Court's preliminary injunction. *See* Resp. App. H, at 104a.

Simultaneous with KBC's action in New York to execute upon the Houston Judgment, KBC began award enforcement proceedings in Hong Kong, Singapore, and Canada. On March 15, 2002 the High Court of the Special Administrative Region of Hong Kong, Court of First Instance (the "Hong Kong Court"), entered a judgment confirming the arbitration award. Resp. App. I, at 105a. Pertamina moved to set aside the Hong Kong Court's judgment, in part because of the purported Indonesian annulment, and the case was tried in early 2003. On March 27, 2003 the Hong Kong Court denied Pertamina's set-aside motion. Just as the Houston Court had done, the Hong Kong court concluded that Pertamina had changed its argument about the law governing the arbitration at the "eleventh hour," and it unequivocally and emphatically rejected Pertamina's contention that the Indonesian Court had jurisdiction to annul the arbitration award. *See id.*

On December 3, 2002 after the Indonesian Court purported to annul the arbitration award, Pertamina moved the Houston Court to vacate its prior judgment enforcing the award. On April 17, 2003 the Houston Court denied Pertamina's motion, finding again, and just as the Hong Kong Court had, that the Indonesian Court had no jurisdiction to annul the award. Resp. App. J, at 169a.

Meanwhile, at the same time Pertamina was seeking to annul the award in Indonesia, it and the Ministry appealed to the Second Circuit the decision of the New York District Court allowing KBC to attach the Retention Fee. Following oral argument, the Court of Appeals affirmed the District Court's order in all respects on December 10, 2002. Pet. App., at 2a. In doing so, the Court of Appeals conducted a two-part analysis of the District Court's order. First, the Court of

Appeals considered Pertamina's and the Ministry's arguments concerning the applicability of the FSIA, properly concluding that because Pertamina had contractually waived its sovereign immunity and had engaged in commerce in New York, it was not entitled to immunity from attachment under the FSIA. Pet. App., at 17a. With respect to the Ministry's independent FSIA claims, the Court of Appeals concluded that because none of the Ministry's funds were subject to attachment under the District Court's order, its sovereign immunity claims were not properly before the Court. *Id.*, n.12. With respect to funds *not* immune from execution (*i.e.*, Pertamina's funds), the Court of Appeals – in accordance with black-letter procedural principles set forth in 28 U.S.C. § 1606 (where no immunity exists, a foreign sovereign is "liable in the same manner and to the same extent as a private individual") and Rule 69(a) of the Federal Rules of Civil Procedure – held that Pertamina's funds are subject to execution under New York law.

Having determined that any funds in the New York trust accounts that belonged to Pertamina (and not the Ministry) are not subject to immunity, the Court of Appeals next reviewed the District Court's analysis of the ownership of the restrained funds, concluding that the District Court's analysis was correct. The Court of Appeals first conducted a choice of law analysis and concluded that the ownership of the restrained funds was properly determined by reference to Indonesian law. It found that under Indonesian law Pertamina has an exclusive interest in its Retention Fee, while the Government has an exclusive interest in the remainder. Accordingly, it affirmed the District Court's ruling that KBC can attach the Retention Fee. *See* Pet. App., at 37a.

The Second Circuit's decision was not a final disposition. It remanded the case to the District Court, and further proceedings are ongoing.[3]

Pertamina moved for rehearing in the Court of Appeals; that motion was denied. Pet. App., at 48a. These Petitions followed.

REASONS FOR DENYING THE PETITION

I. NO FOREIGN SOVEREIGN IMMUNITY QUESTION IS PRESENT

This case turns on two relatively simple questions: who owns the New York bank deposits, and whether the deposits are "property in the United States." If Pertamina owns some portion of the deposits, there is no FSIA issue because Pertamina does not contest that it has waived its immunity and that the funds in New York were used in commerce. If the Government of Indonesia owns the funds, then KBC has no right to attach the property because KBC is not a judgment creditor of the Government. And because KBC has no right to attach the Government's property, it is irrelevant that such property is immune from attachment.

As to the location of the funds, neither court saw any reason to question that the property to be attached is in New York. The deposits are at New York banks, Pertamina has

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3. Three motions are currently pending before the District Court: (1) KBC's Motion for Execution or Turnover of 5% of Net Operating Income, (2) Pertamina's Motion to Stay Execution, and (3) the Ministry's Motion to Vacate Immediately Restraining Notices on LNG Revenues Held to Belong to the Government of Indonesia. Each of these motions has been preliminarily set down by the District Court for oral argument on May 23, 2003.

an undisputed statutory right to the Retention Fee, and it presently possesses and controls the deposits. Under those circumstances, it is clear that the attached property is "in the United States."

In determining ownership of the New York deposits, both the District Court and the Court of Appeals looked to Indonesian law. The relevant Indonesian law states:

> Article 5(1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article shall be the Government's portion.

Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5.

The Court of Appeals interpreted this Indonesian decree in accordance with its express terms:

> This provision, by using the possessive "Government's," mandates that all of the disputed funds, with the exception of the five percent that constitutes Pertamina's Retention, belong to the Republic of Indonesia.

* * *

> Pertamina also argues that it has no right to the Retention, or, at a minimum, no right to eighty percent of the Retention. We disagree. While Pertamina may be under an obligation to transfer the Retention to the Ministry's account in New York, this fact does not alter the extant allocation of ownership interests. Pertamina has not identified any Indonesian statute or regulation that grants the Republic of Indonesia ownership rights in the Retention.

Pet. App., at 32a, 36a.

Thus, applying Indonesian law, the Second Circuit concluded that Pertamina has an exclusive ownership interest in the portion of the deposits held in its name in New York that constitute the Retention Fee, and that the Republic has no ownership interest whatsoever in the Retention Fee. Indeed, neither Pertamina nor the Ministry appeals the Court of Appeals' decision that Pertamina has an exclusive statutory right to the Retention Fee.

Following the mandate of the FSIA, the Second Circuit looked to New York attachment law:

> The FSIA states that when a foreign state is not protected by sovereign immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In attachment actions involving foreign states, federal courts thus apply Fed. R. Civ. 69(a), which requires the application of local state procedures. *See Alliance Bond Fund, Inc. v. Grupo Mexicano de*

> *Desarrollo, S.A.*, 190 F.3d 16, 20 (2d Cir. 1999) (applying Rule 69(a), and hence New York law, in an FSIA action).

Pet. App., at 17a-18a. The relevant New York provision states that:

> **Property against which a money judgment may be enforced**. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

N.Y. C.P.L.R. § 5201(b) (emphasis supplied)

The Second Circuit then found that:

> [U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." *Gala Enterprises, Inc. v. Hewlett Packard Co.*, 970 F. Supp. 212, 217 (S.D.N.Y. 1997) (citation and internal punctuation omitted); *accord Leon v. Martinez,* 84 N.Y.2d 83, 88 n.1, 638 N.E.2d 511, 513 n.1, 614 N.Y.S.2d 972, 974 n.1 (1994) ("An assignment may properly relate to a future . . . right which is adequately identified. . . ."). As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

Pet. App., at 22a. Thus, the Second Circuit concluded that under New York law Pertamina's ownership interest in the

New York deposits is subject to execution by KBC. In reaching that conclusion, the Second Circuit implicitly rejected Petitioners' arguments that the attached property is not "in" New York. In denying Petitioners' motions for rehearing, it again rejected those arguments. The Court of Appeals then remanded the case for further proceedings.

Pertamina and the Ministry, citing the FSIA requirement that property to be attached must be "in the United States," again argue that the attached property is not "in" the United States because Pertamina takes final possession of its Retention Fee in Indonesia.

It is difficult to credit this argument. Pertamina and the Ministry confuse the location where Pertamina again receives the Retention Fee with the present location of the attached property. The attached property consists of funds that Pertamina has an undisputed and exclusive statutory right to retain, and that are on deposit in Pertamina's name, subject to its possession and control, at a bank branch located in New York. The fact that in the future Pertamina may transfer the Retention Fee to the Government, which then transfers it back to Pertamina, simply does not affect whether Pertamina has an existing, attachable interest in funds that are now, quite literally, "in" New York. Because the attached property is in New York, there is no FSIA question, and under New York law, Pertamina's interest in these funds is properly attachable.

What we have here, to sum, is simply a factual dispute. Numerous federal courts have ruled that the question of a party's interest in property is a question of fact. *See, e.g., Anglemyer v. Hamilton Co. Hosp.*, 58 F.3d 533, 537 (10th Cir. 1995) (whether contract creates a property

interest is a question of fact); *Green v. City of Hamilton Housing Auth.*, 937 F.2d 1561, 1563 (11th Cir. 1991) (denying summary judgment based on question of fact with respect to property interest); *The Kentucky Co. v. Hayes*, 407 F.2d 1031, 1035 (6th Cir. 1969) (extent of property interest is question of fact); *Pope v. City of Clearwater*, 767 F. Supp. 1147, 1150 (M.D. Fla. 1991) (ruling that question of fact concerning existence of property interest was required to be resolved). Similarly, any holding as to the location of the funds was factual. Because this case turns on the factual questions of ownership of the New York deposits and their location, certiorari would be improvident. *See* Sup. Ct. R. 10 (petition for certiorari is rarely granted when asserted error consists of erroneous factual findings).

II. THE SECOND CIRCUIT'S DECISION IS IN HARMONY WITH THIS COURT'S PRECEDENTS AND THOSE OF SISTER CIRCUITS

The Second Circuit's judgment in this case is fully consistent with this Court's jurisprudence and the decisional law of other circuits. The Ministry claims that the Second Circuit decision conflicts with decisions from other circuits holding that "if property lies outside the United States, it remains absolutely immune from attachment and execution." Petition, at 20 (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992); *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260-61 (5th Cir. 2002); *Fid. Partners, Inc. v. First Trust Co. of N.Y.*, 58 F. Supp. 2d 55, 61 (S.D.N.Y. 1999)). There is no conflict with these decisions. Neither of the courts below found that the property to be attached is located outside of New York, because it is undisputed that deposits at issue, and thus Pertamina's interest, are in New York.

By contrast, in *Richmark* (a case principally involving compliance by a sovereign entity with a federal court discovery order), the court merely noted (in dictum) that the FSIA "does not empower United States courts to levy on assets outside the United States." *Richmark*, 959 F.2d at 1477. That principle is irrelevant here because the New York deposits are, obviously, in the United States.

Connecticut Bank is equally inapposite. The Fifth Circuit there vacated an order dismissing a garnishment action against Texas oil companies that owed royalties and taxes to the Republic of Congo. The court held that further factual development was required to determine whether the funds subject to the garnishment order were generated from and used in connection with commerce in the United States. Thus, the Fifth Circuit's decision focused on the "generation from and use in commerce in the United States" requirements of the FSIA, *Connecticut Bank*, 309 F.3d at 260-61, not on the location of the property. Neither Pertamina nor the Ministry disputes that the funds contained in the New York trust accounts are used in commerce in the United States, and the Second Circuit expressly found that they were. *See* Pet. App., at 17a.

Finally, the Ministry's contention that the Court of Appeals' judgment conflicts with the district court's decision in *Fidelity Partners* is also incorrect. In *Fidelity*, the bond interests in question was reflected only on the books of a bank in Manila, not the United States, as is the case here.

Pertamina and the Ministry attempt to create a circuit conflict where none exists. The Second Circuit allowed KBC to attach a portion of Pertamina's bank deposits that are indisputably in New York, and that conclusion is consistent with all existing case law.

III. THERE IS NO FOREIGN RELATIONS ISSUE

This case is little more than a deadbeat foreign corporation's refusal to pay its lawful debts. But the Ministry predicts that the Second Circuit's decision will "interfer[e] with U.S. foreign relations" and "impair the relationship between U.S. money center banks and foreign states and instrumentalities." Petition, at 4. That is simply not true, for the United States government itself views this as a run-of-the-mill commercial dispute.

The Republic of Indonesia has at least three times asked the United States Department of State to intervene in this case, *see* Resp. App. K, at 175a, and the State Department has each time refused. The State Department views this as an ordinary commercial dispute that does not implicate any sovereign interests of the United States. Thus, the Second Circuit's decision does not constitute a matter of such public importance that warrant this Court's exercise of jurisdiction.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be denied, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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